

IN THE
**United States Circuit Court
of Appeals for the
Ninth Circuit**

AMERICAN SURETY COMPANY
OF NEW YORK, a Corporation,
Plaintiff in Error,

vs.

PETER SANDBERG and
MATHILDA SANDBERG,
his wife,
Defendants in Error.

No. 2951

Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

American Surety Company of New York, upon receiving the application introduced in evidence as Plaintiff's Exhibit No. 2 and as set forth in the complaint (record p. 28), made and entered into a bond, Plaintiff's Exhibit No. 3, in the sum of

twenty-five thousand dollars (\$25,000) to Powell River Paper Company, Ltd.

Thereafter Wells Construction Company made default in its contract and Powell River Paper Company, Ltd., enforced the bond with the result that a judgment was taken against the American Surety Company of New York for the sum of thirty-one thousand six hundred thirty-two and 94-100 dollars (\$31,632.94) to the extent of the amount of its bond in the sum of said twenty-five thousand dollars (\$25,000).

In and about these proceedings there were stipulated items of costs and expenditures amounting to fifteen hundred fifty-six and 20-100 dollars (\$1556.20) in defense of liabilities adjudicated against the plaintiff in error, making in all a total of twenty-six thousand five hundred fifty-six and 20-100 dollars (\$26,556.20).

For the purpose of recovering these moneys from Peter Sandberg and Mathilda Sandberg, his wife, as the community, a complaint was filed in the United States District Court of the Western District of Washington, Southern Division. The particular features of the indemnity agreement or contract upon which the right of recovery was based consist of the following:—

“VIII. That the Surety shall, at its option, have and may exercise, in the name of the indemnitor, or otherwise, **any right, or remedy, or demand which the indemnitor may have for**

the recovery of any sums paid by the **Surety** by virtue of its suretyship, and any and all extensions and renewals thereof, **together with all other rights and remedies and demands, which the indemnitor has or may have in the premises, all of which rights and remedies and demands the indemnitor hereby assigns to the Surety**, with full power and authority to said Surety, in the name of the indemnitor, or otherwise, as it may be advised, and as attorney for such indemnitor, to do anything, which the indemnitor might do, if personally present, if this instrument were not executed, and the indemnitor hereby appoints said Surety as its attorney for such purpose.”

* * * * *

“**X.** That the **Surety** also looks to and relies upon the property of the indemnitor and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the **Surety**, under this agreement, such suretyship having been by the **Surety** entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor’s property, its income and earnings; the indemnitor being substantially and beneficially interested in the

award and performance of such contract and obtaining such suretyship.”

(See record pp. 24 to 26.)

The defendants made an answer and admitted that Peter Sandberg signed and subscribed the application for the contract bond as set forth in the complaint, but both defendants took the position that the application was signed for the sole benefit, use and accommodation of Wells Construction Company and not for the use, benefit or profit of Peter Sandberg or his co-defendant, Mathilda Sandberg, or the community consisting of the defendants nor for the aid, use or benefit of any purpose in which the defendants or either of them or the community consisting of them was interested. The scope of the answer of the defendants is practically within these limits and they set forth a detailed list of the community property and allege that it would be a cloud upon the title if a judgment was rendered against Peter Sandberg individually or against the defendants jointly.

(See record p. 42.)

The complaint in this case specifically presented the following certain and definite issue:—

“Par. XI.

That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and in-

demnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.

Par. XII.

That in and by paragraph IX in said application and indemnity agreement hereinbefore referred to and in paragraph VI hereof described, it is, among other and various things, provided that the order, judgment or adjudication by reason of such suretyship shall be prima facie evidence of the fact and of the extent of the indemnitor's liability thereof to the surety, and in addition thereto in clause X thereof and as a stipulated condition for the execution of said bond, it was agreed and covenanted that the surety looked to and relied upon the property of the said Peter Sandberg and the income and earnings thereof, either present or future, for anything due or to become due the surety under said agreement and that the suretyship was entered into for the special benefit of the said Peter Sandberg and the special benefit and protection of Peter

Sandberg's property, its income and earnings, he being substantially and beneficially interested in the award and performance of said contract and of the obtaining said suretyship and to both said clauses IX and X said Peter Sandberg agreed in addition to the other clauses in said agreement.

Par. XIII.

That the defendant, Peter Sandberg, contracted with the plaintiff in the manner aforesaid in the prosecution of the community estate, business and enterprise in such manner that the community would and did obtain the benefit of the continuance of the business of the Wells Construction Company and of contracts entered into between it and Powell River Paper Company, Limited, on or about the 2d day of June, 1910, for the construction of a dam and canal on Powell River in British Columbia and participation in profits derived from its operations in the Province of British Columbia and would and did further obtain the postponement of payment and discharge of indebtedness of Peter Sandberg and said community, estate and business from liability thereon to said Wells Construction Company."

The plaintiff in error made its motion early in the case to strike out this answer for the causes and reasons set forth on pages 43 to 45 of the record, and the Court granted the paragraph of

the motion which was a denial as shown in paragraph IV of the answer (p. 38 of record) that in turn was directed to paragraph XI of the complaint.

Now paragraph XI of the complaint distinctly alleged:—

“That the said Peter Sandberg has not kept and performed said agreement of indemnity or done or performed any of the things required in and by the terms of the application and indemnity agreement signed and executed by him as in paragraph VI hereinbefore set forth or any part thereof; and that neither the Wells Construction Company nor Simon Mettler nor Geo. E. Vergowe nor Joe Wells nor any of them have paid or caused to be paid or indemnified or reimbursed this plaintiff against the amount of said judgment and the losses accruing upon said contract and bond or any part of the same.”

(See record p. 34.)

The Court made its order that the answer as stricken might stand as the amended answer (record p. 46) and thereupon the plaintiff in error filed its reply which tendered issue upon denials as to affirmative matter and pleaded affirmatively and as new matter estoppel of the right to either or both of the defendants to deny the terms of the written agreement, Plaintiff's Exhibit No. 2.

(See record pp. 50 and 51.)

Moreover estoppel was also pleaded based upon the proposition that the contract, so far as the plaintiff in error was concerned, was executed and that the plaintiff as surety had relied upon the contract and representations of said Sandberg in his said contract when the plaintiff in error had given its bond to Wells Construction Company.

(See record p. 54.)

Furthermore estoppel was pleaded based upon specific notice upon Peter Sandberg at his family residence.

(See record pp. 57 to 63.)

(See, also, Assignments of Error, 2nd, 3rd, 9th and 10th.)

(Record pp. 258 to 260.)

At the time of trial the Court permitted Mathilda Sandberg to file a separate answer over the objection of the plaintiff in error.

(See record pp. 63 to 69.)

The case was stipulated to be tried before the Court without a jury and as the findings of fact and the opinion of the Court and its actions on the different features of the case will be discussed in the brief, it is not disposed here in the statement to make a long explanation of it. Suffice it to say that the Court granted a judgment against Peter Sandberg individually, but denied any relief against the

community and held to all purposes and effects that there was nothing in the estoppels pleaded; that because Peter Sandberg had made these agreements as the husband and agent of the community was no reason why the community should be bound and thereupon passed a judgment wherein, according to the fourth conclusion of law, it was provided:—

“That said judgment should provide that it is a separate debt of Defendant Peter Sandberg, and not a debt, liability or obligation of Defendant Mathilda Sandberg, or of the community consisting of Peter Sandberg and Mathilda Sandberg, his wife, and that the same should provide that it is not, and does not constitute a lien or a cloud on the title of the real property of defendants hereinabove specifically set forth.”

Such a judgment was entered (record pp. 164-166.)

Within the time provided by law plaintiff sued out its writ of error and filed its assignments of errors and the cause comes to this Court to correct the judgment thus entered.

Big Facts in the Case and Court's Action Thereon

The trial court's refusal to sustain the motion of the plaintiff to strike out the answers of defendants in the particulars mentioned (record pp. 43-45) is assigned as error, record page 257.

But the trial court did strike out Par. IV of the **joint answer** of defendants, record page 38, and also Par. IV of the separate answer of Mathilda Sandberg, which the court allowed her to file on the day of the trial. (Record p. 65.)

Consequently Par. XI of the complaint of the plaintiff stood then and stands now as admitted. The full importance of this situation appears when the findings of the court in this relation are examined.

The court among other findings of fact made the following:—

“XIII.

That on June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe executed to Peter Sandberg an indemnity agreement to save and keep harmless the defendants from any liability under ‘Plaintiff's Exhibit 2,’ and said agreement

was introduced and received in evidence herein as 'Plaintiff's Exhibit 10.'

XIV.

That on the 3d day of October, 1910, Wells Construction Company rendered and made its statement of account to Sandberg claiming a balance of thirty-five thousand dollars (\$35,000) then due."

* * * * *

"XVI.

That on November 29, 1910, Peter Sandberg rendered and made a statement of his account to Wells Construction Company therein claiming upwards of three thousand dollars due the community from said Wells Construction Company.

XVII.

That Peter Sandberg paid direct certain material-men furnishing supplies and laborers performing work, to-wit, Tacoma Mill Company, to-wit, one named Grosser, to-wit, one named Olaf Halstead, for material and labor in the construction of the Kentucky Liquor Company building pursuant to Defendant's Exhibit 'A' entered into with Wells Construction Company.

XVIII.

That Peter Sandberg took over the building known as the Kentucky Building under the contract Defendants' Exhibit 'A,' and finished it himself as Wells Construction Company did not perform its contract for the completion of said building.

XIX.

That the work which the Wells Construction Company was doing in June for Peter Sandberg was community work and the building described in Defendants' Exhibit 'A' was a community building and consisted of and became community property.

XX.

That on February 20, 1911, in cause 30878 in the Superior Court of the State of Washington, Peter Sandberg swore to and filed a complaint wherein Peter Sandberg was plaintiff and Simon Mettler, Anna Mettler and Carl Mettler, were defendants and the same is in evidence in this cause as 'Plaintiff's Exhibit 7' and therein and therefrom it appears that Peter Sandberg alleged and stated in respect of the transactions concerned in this case:—

'III. That on or about said last date above referred to, to-wit, the — day of August,

A. D. 1910, the defendants, Simon Mettler and Anna Mettler, his wife, and said George E. Vergowe and his wife and said Joe Wells and his wife, and the Wells Construction Company, a corporation, entered into an oral agreement with plaintiff, wherein and whereby in consideration of plaintiff's endorsing certain notes, bonds and guarantees, hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements, for which said Wells Construction Company then held contracts, it was agreed that they, said Vergowe and wife, and said Wells and wife, Simon Mettler and Anna Mettler, his wife, and Wells Construction Company, a corporation, would convey by deeds of conveyance certain real property in Pierce County, Washington, held and owned by them to fully secure and indemnify plaintiff on account of his endorsements of said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business. * * *

'IV. That pursuant to said agreement so entered into, plaintiff on or about the — day of August, 1910, went with the defendant, Simon Mettler, to the City of Vancouver, in

the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at said defendant's request, and in accordance with said agreement hereinabove referred to, endorsed certain promissory notes and a guarantee in writing to The Bank of Vancouver, of Vancouver, B. C., to the amount of Twenty-five Thousand (\$25,000) Dollars, and plaintiff pursuant to said agreement so made with said defendants endorsed as a surety an indemnity bond to the American Surety Company in the sum of Ten Thousand (\$10,000) Dollars, to enable said defendants and said Wells Construction Company to enter into a contract with the said City of Vancouver, B. C., for the construction of a certain reservoir, and at the same time endorsed and signed an indemnity bond to said American Surety Company in the sum of Twenty-five Thousand (\$25,000) Dollars to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation; that said notes and said guarantee are long past due and unpaid, and said contracts with said City of Vancouver and said Powell River Paper Company, are yet uncompleted and plaintiff is as yet unrelieved from the liability on account of said notes, guarantee and indemnity bonds. * * *

'XII. That the liability of plaintiff on ac-

count of the bonds, notes and guarantees executed by him pursuant to said agreement with the defendants, Simon Mettler and Anna Mettler, his wife, hereinbefore set forth, has not as yet, and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be that the same will probably exceed Thirty Thousand (\$30,000) Dollars, over and above the securities and indemnity already held by plaintiff.'

XXI.

That on the 26th day of May, 1914, in cause No. 35986 in the Superior Court of the State of Washington, in and for Pierce County, wherein the Molsons Bank, a corporation organized and existing under the laws of Canada, duly chartered under the laws of Canada, was plaintiff and Peter Sandberg and Mathilda Sandberg, his wife, were defendants, the defendants, Peter Sandberg and Mathilda Sandberg, through and by their attorneys, Messrs. Bates, Peer & Peterson, in said court, in said cause, in answer to interrogatories propounded to them, filed and made answer to said interrogatories as introduced in evidence in this

cause as 'Plaintiff's Exhibit No. 8' as follows, to-wit:—

'INTERROGATORY No. I.

'Did the Wells Construction Company do any work for you or either of you, at any time before the execution of the note sued on in this case?

'ANSWER TO INTERROGATORY No. I.

'Yes.

'INTERROGATORY No. II.

'If you answer the preceding interrogatory in the affirmative, please state the time, character and amount of the work done, and the contract price therefor.

'ANSWER TO INTERROGATORY No. II.

'The Wells Construction Company started the construction of a seven story concrete building 25 feet in width and 100 feet in length adjoining another building of like size owned by defendant on Lot 12, Block 1104, of the City of Tacoma, during the month of February, 1910. That said building was to be of reinforced concrete, and was to have been completed by said company on or before May 1st, 1910. That the contract price therefor was Thirty-three Thousand (\$33,000) Dollars. That during the construction of said building an additional story was added thereto as an extra,

at the agreed price of Thirty-five Hundred (\$3500) Dollars. That there were certain other extras consisting of the digging of a concrete sub-basement, and the enlarging of a chimney, and some extra work in a store adjoining, and the furnishing of some extra sash in the halls of the old adjoining building, and extra painting amounting in all to \$1379, making the total contract price for said building, including extras \$37,879.00.

‘INTERROGATORY No. III.

‘What did you every pay the Wells Construction Company for the work done by them for you?

‘ANSWER TO INTERROGATORY No. III.

‘I paid the Wells Construction Company \$35,794.40 in cash, and paid material-men for material going into the construction of said building under said contract, which material bills said Wells Construction Company were liable for under said contract and agreed to pay, and left unpaid, the sum of \$1677.84, which I paid at the request and instance of the Wells Construction Company.

‘That in the construction of said building certain deductions were made by defendants, on account of the moneys to become due the Wells Construction Company, as follows:

40 days labor at cleaning up around

building, at \$2.50 per day.....	\$100.00
Cleaning of floors in third story of the old and new building.....	300.00
2 Doors taken out in the old Kentucky Building	100.00
Breaking of Skylight in Langlow Building adjoining	17.90
Cost of installing switches for lights in Kentucky Building	700.00
Wiring floors for bell push-buttons..	200.00
10 fire doors short.....	200.00
	<hr/>
	Total, \$1,617.90

‘That in addition thereto defendants cancelled a claim against the Wells Construction Company for demurrage at the rate of Twenty-five Dollars per day, for every day said building remained uncompleted after May 1st, 1910, under the terms of said contract, which claim for demurrage extended from May 1st, 1910, to November 29th, 1910. * * *

‘INTERROGATORY No. VI.

‘State when it was the Wells Construction Company constructed a building for you in Tacoma. Give the date they commenced the work and the date of the completion of same.

‘ANSWER TO INTERROGATORY No. VI.

‘The Wells construction Company began the construction of a building for defendants in

February, 1910, and worked on the same until some time in the month of October, 1910, when defendants were required to complete the building themselves. * * * ”

“XXIV.

That during all the times herein mentioned Messrs. Bates, Peer & Peterson were attorneys for Peter Sandberg and for Wells Construction Company and for the receiver of Wells Construction Company and for the Bank of Vancouver in the Mettler bankruptcy proceedings and for Kentucky Liquor Company, and Messrs. Peterson and Peer were on November 26, 1910, president and secretary, respectively, of Wells Construction Company.”

Plaintiff filed its exceptions to the findings of fact, etc., made by the court (record pp. 158-163) and among others presented the following exception:—

“ELEVENTH EXCEPTION:

Plaintiff excepts to the finding of fact numbered IX wherein it is found that the notice of the 17th of May, 1911, was served upon Peter Sandberg ‘at his place of business,’ whereas the evidence shows and the notice itself in evidence with proof of service attached thereto exhibits, that upon that date there was served upon Peter Sandberg as his residence and at the residence of Mathilda Sandberg in

Tacoma, a notice as specified in said finding, which is Plaintiff's Exhibit 4, and that said finding IX is against the evidence for that Mathilda Sandberg had means of knowledge and her attorneys, Messrs. Bates, Peer & Peterson, knew of all the matters and things contained in said notice."

(See Assignment of Error, Thirty-first, Record p. 269.)

In this connection the testimony of Mrs. Sandberg (record p. 183 is very important.)

"On cross-examination this witness testified that she was sure that none of the property which had been described in her answer was ever the property of Peter Sandberg before they were married and that she was sure he did not have any other property, and during all of the time that they had lived together Mr. Sandberg was looking after all of the property interests and was looking after all of the business and that she always trusted her husband and did not take any part in that and that whatever had been made and whatever had been done had been done by Mr. Sandberg and she went along with him as his dutiful wife."

(See Assignment of Error, thirty-third, Record, p. 269.)

(See, also, Assignment of Error, Thirty-fourth, Record, p. 270.)

The contracts of indemnity that Peter Sandberg

admittedly entered into for the desired benefit of the community were as follows:—

“Plaintiff’s Exhibit 9—Agreement, November 26, 1910, Between Kentucky Liquor Co. et al. and Simon Mettler.

“THIS AGREEMENT, Made and entered into this 26th day of November, A. D. 1910, between THE KENTUCKY LIQUOR COMPANY, A Washington corporation, THE WELLS CONSTRUCTION COMPANY, a Washington corporation, GEORGE VERGOWE and CARRIE VERGOWE, his wife, parties of the first, and SIMON METTLER, party of the second part.

WITNESSETH: Whereas the Wells Construction Company has heretofore conveyed by deed of conveyance to the Kentucky Liquor Company, a corporation, as trustee for Peter Sandberg and the Bank of Vancouver, a British Columbia Corporation, and the Molsons Bank, a British Columbia corporation, both of Vancouver, B. C., a certain real property in Pierce County, Washington, described as follows, to-wit:

Dia. Twelve (12), Lot Fifteen (15) Section Eleven (11), Township Twenty (20), Range Three (3) East; Lots Five (5) to Fourteen (14), Block 8858, Indian Addition; Lots Eighteen (18) and Nineteen (19), Block 8050, Indian Addition; Lots Nine (9) to Twenty-six

(26), Block 8150, Indian Addition; Lots Nineteen (19) to Twenty-six (26), Block 8249, Indian Addition; North $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, Sec. 14, Twp. 20, Range 3 E.

And whereas George Vergowe and Carrie Vergowe, his wife, have heretofore transferred and conveyed by deeds of conveyance to Kentucky Liquor Company, a Washington corporation, as trustee for Peter Sandberg and the bank of Vancouver, a British Columbia corporation, of Vancouver, B. C., and the Molsons Bank, a British Columbia corporation, of Vancouver, B. C., certain real property in Pierce County, Washington, described as follows, to-wit:

The north thirty (30) acres of the Northwest quarter ($\frac{1}{4}$) of the Northwest ($\frac{1}{4}$) of Section Thirteen (13), Township Twenty (20), Range Three (3) East; also the Northwest quarter ($\frac{1}{4}$) of the Southwest quarter ($\frac{1}{4}$) of the Northwest quarter ($\frac{1}{4}$) of the same Section, Township and Range, which said conveyances by said Wells Construction Company and George Vergowe and Carrie Vergowe, his wife, of said real property above described was made for the purposes and given as collateral security for the payment of certain indebtedness of the Wells Construction Company, to-wit:

A note for the sum of Twenty-five Thousand (\$25,000) Dollars, made by the Wells Construc-

tion Company to said Bank of Vancouver, dated at Vancouver, B. C., ———— 1910, due ninety days after date.

A note for Fifty-five Thousand (\$55,000) Dollars, made by the Wells Construction Company to the said Molsons Bank, a corporation, dated at Vancouver, B. C., ———— 1910, and further to indemnify and save harmless said Peter Sandberg against liability as endorser of said notes of said Bank of Vancouver and said Molsons Bank, a corporation, and further to indemnify said Peter Sandberg against liability as surety on said contract bonds of said Wells Construction Company, as follows:

One to the Powell River Paper Company, Ltd., in the principal sum of Twenty-five Thousand (\$25,000) Dollars; One to the Metropolitan Building Company, Ltd., in the principal sum of Twenty-seven Thousand (\$27,000) Dollars; One to the City of Vancouver in the principal sum of Ten Thousand (\$10,000) Dollars; One to the Pacific Investment Company, Ltd., in the principal sum of Three Thousand (\$3000) Dollars;

And whereas Simon Mettler, above named, is the holder of demand promissory notes of the said Wells Construction Company amounting to Seventy-nine Thousand Five Hundred Dollars (\$79,500), besides interest;

And whereas said Mettler is the holder of

one share of the capital stock of said Wells Construction Company, a corporation;

And whereas said Wells Construction Company has expended and invested large sums of money in the performance of certain contracts entered into by it with said Powell River Paper Company, Ltd., Metropolitan Building Company, Ltd., City of Vancouver, a municipal corporation, and Pacific Investment Company, Ltd., and numerous other persons, which it is necessary to carry to completion to save said Wells Construction Company from becoming insolvent.

And whereas said Simon Mettler is desirous of withdrawing from said corporation, and relieving the same from liability on account of the indebtedness owing him from said corporation in consideration of said corporation carrying on its said business and paying off and discharging its creditors whose claims and accounts said Peter Sandberg has become surety for.

IT IS NOW THEREFORE AGREED, between said parties, that the Kentucky Liquor Company, a corporation, trustee as aforesaid, will hold the title to the lands and premises hereinbefore described for the purposes hereinbefore referred to until such time as it shall be necessary to apply and exhaust the same

for the purposes for which it was conveyed as hereinbefore set forth.

That the Wells Construction Company will apply and exhaust all of its property and assets in payment and discharge of its said obligations on which said Peter Sandberg is endorser, or has become liable in any manner whatever, and that thereafter said Kentucky Liquor Company, a trustee, shall apply by conversion or otherwise, as much of said property above described as may be necessary to satisfy and discharge the balance, if any, of said claims on which said Peter Sandberg may in any manner be liable, and the surplus, if any, of said property remaining in the hands of said Kentucky Liquor Company, trustee, after fully paying and discharging all of said claims and demands of said Bank of Vancouver and the Molsons Bank and Peter Sandberg shall be conveyed by proper deeds of conveyance to Simon Mettler.

IN WITNESS WHEREOF, The Wells Construction Company, a corporation, and the Kentucky Liquor Company, a corporation, have by resolutions of their respective Board of Directors, duly asked and recorded, authorized their president and secretary, respectively, to execute these presents and attach the corporate seals of said corporations, respectively hereto.

IN WITNESS WHEREOF, said parties

have hereunto set their hands and seals at Tacoma, Washington, this 26th day of November, A. D. 1910.

Signed, Kentucky Liquor Company, a corporation, by Peter Sandberg, its President, Attest, P. H. Lack, Secretary. Wells Construction Company, a corporation, by Charles T. Peterson, its President, Attest, Newton H. Peer, Secretary. Geo. E. Vergowe. Simon Mettler.”

It is perfectly apparent that the foregoing agreement is directly within the terms of Article VIII of the indemnity agreement sued upon.

(Plaintiff's Exhibit 2.)

“Plaintiff's Exhibit No. 10—Agreement, June 20, 1910, Between Wells Construction Co. and Peter Sandberg.

“AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of June, 1910, between the Wells Construction Company, a corporation, of Tacoma, Washington, and Peter Sandberg of the same place,

WITNESSETH: That whereas the Wells Construction Company has heretofore on the — day of —, 1910, entered into a contract with the Powell River Company of Vancouver, B. C., for the construction of a dam

and canal on the Powell River, B. C., for a price approximating \$175,000 and

Whereas the said Wells Construction Company has made application to the American Surety Company of New York to become surety on the bond of the said Wells Construction Company in the sum of \$25,000 for the faithful performance by the said Wells Construction Company of the conditions of the said contract, and

Whereas the said American Surety Company of New York refuses to become surety upon the said bond of the said Wells Construction Company without some other person signing the application with the said Wells Construction Company for the said surety company to become surety upon the said bond, and

Whereas the said Peter Sandberg of Tacoma, Washington, has agreed to sign his name with the said Wells Construction Company on the application for the said bond agreeing to indemnify the said surety company in case it should be held liable on the said bond,

Now, Therefore, in consideration of the said Peter Sandberg signing the said application with the said Wells Construction Company for the said surety company to become surety upon the said bond, the said Wells Construction Company agrees to re-pay to the said Peter Sandberg any money or moneys which he may

be required to pay to the said American Surety Company of New York by reason of his signing the said application with the said Wells Construction Company for the said surety Company to become surety upon the said bond and to hold the said Peter Sandberg harmless by reason of his assigning the aforesaid application.

WELLS CONSTRUCTION COMPANY,

By SIMON METTLER,
President.

By JOE WELLS,
Secretary.

We individually agree to hold said Peter Sandberg harmless by reason of signing said application for a bond above mentioned.

SIMON METTLER,
JOE WELLS.”

The Court refused to consider these Exhibits as matter of law in anywise relative to the case so far as community was concerned; and this action is assigned as error,—13th Assignment, record, p. 261.

The trial court in its opinion had this to say of these transactions:—(Record p. 86.)

“Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company’s work in British Columbia in order to save him-

self. He also caused certain property to be deeded over to a company of which he owned the stock, the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself proportioned to the value of the property as transferred.

A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs.”

But both these Exhibits 9 and 10 are actually and specifically covered by the VIIIth article of the indemnity agreement. (Plaintiff's Exhibit 2.)

The Law of the Case

The statutes of Washington relative to the property rights of husband and wife, among other things, provide:—

“The husband shall have the management and control of community personal property with the like power of disposition as he has of his separate personal property,” and “that the husband has the management and control of the community real property.”

And the Supreme Court of Washington, in interpreting these statutory provisions, in *McDonough v. Craig*, a decision by Justice Hoyt, 10 Wash. 241, upon the question “whether or not the community property is liable for the debt incurred by the husband alone,” said:—

“In our opinion the first question above stated has been settled by the decisions of this court. In the case of *Oregon Improvement Company v. Sagmeister*, 4 Wash. 710 (30 Pac. 1058), we held that community property could be sold upon a judgment against the husband, rendered for an indebtedness incurred by the husband by reason of losses in business in which he was engaged, with which the wife had no connection further than that cast upon her, by the law, as a member of the community. In that case it was held that since under our stat-

utes the community was *prima facie* entitled to the profits of any business carried on by the husband, good conscience and fair dealing, as well as logic, required that it should abide the result of such business.

We are satisfied with the rule laid down in that case. A further consideration of the question has confirmed our convictions that everything rightfully done by the husband will be presumed to have been done in the interest of the community, and that such presumption will obtain unless it is made affirmatively to appear that the transaction in question related to his separate property. The legislature never could have intended that everything acquired by the husband as the result of any and every transaction in which he might be engaged should be presumed to be the property of the community, and at the same time not have intended that a like presumption should obtain as to any indebtedness or liability incurred on account thereof. Under the law as established by that case, it must be held that any liability incurred by the husband in the prosecution of any business is *prima facie* a charge against the community; and that the presumption to that effect will continue in force until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit, if profit had been realized therefrom.”

In the late case of *McElroy v. Hooper*, the Supreme Court of Washington said, 70 Wash. 350:—

“The husband has the management of the community property. As the community profits by his good judgment, so it must bear the losses of his mistakes. It cannot accept the one and repudiate the other.”

In *Miller v. Geary*, 81 Wash. 217, at page 221, the Supreme Court, speaking through Judge Mount, confirms the repeated holding that the husband is the agent of the community and the community therefore liable for the acts and things thus done by him for it.

Woste v. Ruge, 68 Wash. 90, where the community is held liable for a tort on the theory of the husband's agency for the community business.

THE COURT REMEMBERS IN THIS CASE THE POSITIVE TESTIMONY OF BOTH SANDBERG AND WIFE THAT THERE IS NO OTHER PROPERTY OWNED BY ANY OR EITHER OF THEM THAN PROPERTY, REAL AND PERSONAL, ACQUIRED SINCE THEIR MARRIAGE AND THEREFORE THERE IS NO SEPARATE ESTATE OF EITHER OF THEM.

In a still later case, the Supreme Court of Washington, in *Stuart v. Bank of Endicott*, 82 Wash. 106, holds unqualifiedly that the community personal property, by reason of the above quoted statute, becomes impressed with all liabilities, either communal or personal.

Judge Hanford while on the Bench in this District decided the case of *Levy v. Brown*, 53 Fed. 568, and therein held that the community personal property was liable even for a debt of the husband alone.

The statutes of Washington further provide (Rem. & Bal. Sec. 5917), "Property, etc., acquired after marriage by either husband or wife or both is community property."

The Supreme Court of Washington, referring to the case of *McDonough v. Craig*, above quoted, and to later cases, fixed the character of a contract which the husband signed alone, and in the course of its opinion said:—

"Under the statute, he has the management and control of the personal property. He had in his possession \$1,074 of community funds which he desired to invest in this real estate. His wife objected. But he persisted in his desire and purchased the property. He had a right to do so, under the statute which gives him the management and control of the personal property. It will not do to say that, where one member of the community uses community funds against the wishes of the other member of the community and makes an investment, a mere objection of the other makes the property acquired the separate property of the one making the investment. And yet, if the contention of the appellants is sustained in this

case, that would be the result; for it is argued that, because Mrs. Murrey objected to the contract, it became the separate contract and liability of her husband.”

Baker v. Murrey, 78 Wash. 241.

To the same effect is Johns v. Clothier, 78 Wash. 615.

It is quite immaterial under the interpretation of the law made by the Supreme Court of Washington above shown and in the still later case of Way v. Lyric Theater, 79 Wash. 275, at page 278, whether any profit or benefit resulted from the transactions had and all evidence therefore as to whether or not Sandberg or Mrs. Sandberg received any money or benefit does not present any issue whatever; the test is, was the transaction under all the facts carried on for the benefit of the community. The evidence showing that there was nothing else than the community, neither Sandberg nor his wife having any other property to be benefited, the incontrovertible conclusion is that the transactions were for the community.

In the recent case of Bird v. Steele, 74 Wash. 70, the Supreme Court, speaking through Justice Chadwick, announces this doctrine:—

“Roberge and Steele were subcontractors, and engaged to do certain work for a stipulated price. They failed to meet the terms of their contract, and the firm is chargeable with the amount that Raftery paid for them. The

primary test in this, as it has been in all of the later decisions of this court, is to ascertain the character of the debt. If the debt is a separate debt of the husband, the community would not be bound. **If it is a debt incurred in the prosecution of a business or an enterprise out of which the community would have reaped a benefit, it is a community debt, and the husband and wife are principals in so far as their community property is concerned.** Measured by this standard, we have no doubt that the obligation assumed by Mrs. Steele was direct and not collateral; that she executed the contract as a principal and not as a surety. This court has held in a long line of cases, indeed, as it said in *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738, that a debt contracted by the husband in the prosecution of the community business renders the community property liable for the debt, is no longer an open question in this state. This principle has been applied to simple contract debts. *Oregon Imp. Co. v. Sagneister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610. To an accommodation Indorser: *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402. To one liable for a superadded liability as a subscriber

to the stock of a corporation: *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536. To obligations incurred as a surety for a corporation in which the husband is a stockholder and the stock belonged to the community: *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128. In an action for fraud and deceit: *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. And finally it was held that the community is liable for a tort committed by the husband when engaged in a business conducted for the benefit of the community. *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913 A. 318, 36 L. R. A. (N. S.) 88; *Woste v. Ruggie*, 68 Wash. 90, 122 Pac. 988."

This being the law of the State of Washington upon this subject, the Federal Courts follow the decisions of the highest Court of the State interpreting the law of the State with respect to property rights.

Buchser v. Morse, 196 Fed. 577 at middle of p. 579;

Affirmed by Circuit Court of Appeals, Ninth Circuit, 202 Fed. 854, at p. 856;

Note: (The foregoing decision was originally made by District Judge Rudkin);

In re Farrell, 211 Fed. 212, at p. 214;

Note: (A decision by District Judge Neterer);

Old Colony Trust Company v. City of Tacoma, 219 Fed. 780;

Note: (A decision by District Judge Cushman);

Seattle R. & S. Railway v. State of Washington, 231 U. S. 568, 58 L. Ed. 372.

Sandberg deliberately contracted in writing with the plaintiff that he was beneficially interested in the performance of the contracts of the Wells Construction Company and the law will not now permit him to deny that fact.

The plaintiff pleaded this contractual stipulation in its complaint and has again pleaded its contractual stipulation in its reply.

The decisions of the Supreme Court of the United States establish the worth of this plea and that Sandberg is estopped.

Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167;

United States v. Lamont, 155 U. S. 303, 39 L. Ed. 160;

Consumers Cotton Co. v. Ashburn (C. C. A. 5th Ct.), 81 Fed. 335;

George v. Tate, 102 U. S. 564, 26 L. Ed. 232.

In the case of Samuel Sprigg v. Bank of Mt. Pleasant, 10 Peters 257, 9 L. Ed. 416, the Supreme

Court of the United States at this early date announced the rule as follows:—

“In this case the fact of the defendant’s being surety is not only not admitted, but it is alleged that he is estopped from setting it up by his own admission in his obligation that he is principal. And we are not aware of any place giving countenance to such a defense at law, under such circumstances.”

Merchants National Bank v. Murphy, 125
Iowa 609, 101 N. W. 442.

Argument

THE FIFTH, SEVENTH, TWELFTH AND TWENTY-NINTH ASSIGNMENTS OF ERROR CONSIDERED TOGETHER.

These assignments present what are believed to be the crucial questions of the case upon the record. They will be found coupled together at page 268 of the record, and separately stated at pages 258 and 259, and at 260 and 261. They present the following matters:—

“Twenty-ninth. That the Court’s rulings upon the trial with reference to the interest of the community were inconsistent, erroneous and against the law and the evidence in this, to-wit: The said rulings for identification on this

assignment being referred to as A, B and C:

A. 'It appears to me that if you depend upon the statement of Mr. Sandberg that he was interested in that company, that the statement proves itself, and it does not particularly matter whether it was direct or not. If you contend that he was interested outside of that in this company, the burden is upon you and the defendants need not undertake to overcome it in this way, but I will overrule the objection just simply throwing that out as my intimation of the effect of this evidence at this time.' (Record p. 258.)

B. 'It will be admitted as tending to show the nature of Sandberg's interest in this company. It does not necessarily show that it is the only interest he has in that company, but it is one interest. When I say interest in the company, I mean the manner in which he was in one sense interested in that company.' (Record p. 259.)

C. 'Is it not true that if your position on the law is correct, the giving of this indemnity makes such a transaction as to bind wife and community, if you show that Mr. Vergowe gave one deed, you would get as much advantage as though you brought in a bushel of deeds.''' (Record p. 261.)

If Sandberg's testimony be accepted as true, then Wells Construction Company was largely indebted

to Sandberg in June, 1910, upon contract, "defendants' exhibit A."

If Wells' testimony be also accepted as true, then Sandberg was owing the Company, and the Company was owing Sandberg, about June and October, 1910.

If Mettler's testimony likewise be accepted as true, then Sandberg was owing Wells Construction Company some considerable sum in June and August, 1910.

In any of these three specified conditions of evidence the conclusion is irresistible that the Sandberg community was materially concerned in the affairs and acts of Wells Construction Company.

All of the undisputed and uncontradicted circumstances show that Sandberg's intention and purpose was to take and obtain full indemnity for all liabilities the community assumed through him.

Particularly the payments for labor and for material that went into the building erected under "defendants' exhibit A."

(See checks to Tacoma Mill Company.)

(See checks to Grosser.)

(See checks to Olaf Halstead and others.)

Sandberg also testified he had to take the building over and finish it himself.

This undoubtedly was community business; and Sandberg took and obtained the agreements of June 20, 1910, and November 26, 1910, from Wells

Construction Company as indemnity against community liability therefor.

The joint answer of both defendants settled before trial upon the issues of fact and law admits all of the facts in this case entitling plaintiff to recover. Subsequently and at the time of trial the Court allowed the filing, over objection, of a separate answer for Mathilda Sandberg, wherein she eliminates the entire paragraph III of the joint answer heretofore filed and changes her plea of direct admission that a judgment against Peter Sandberg would be a cloud upon the title to the community real property. The defense of confession and avoidance as accommodation maker and surety is preserved in the old answer, against which plaintiff pleads estoppel.

June 20, 1910, Sandberg executed and acknowledged before notary public, plaintiff's exhibit No. 2, which is the indemnity agreement sued upon that among other things specified the construction then in progress of the building described in "Defendants' Exhibit A."

June 20, 1910, Wells Construction Company, together with Simon Mettler and George Vergowe, individually executed to Peter Sandberg an indemnity agreement specially to save the community estate of Sandberg and wife harmless from any liability under plaintiff's exhibit 2, then executed by Sandberg to enable Wells Construction Company to get its expected contract.

November 26, 1910, Peter Sandberg, Chas. T. Peterson, his attorney, and Rydstrom with Wells went to Vancouver about the business. On or prior to this date Mettler, Vergowe, Wells and Lund had turned over their stock to Peter Sandberg at a meeting at which Sandberg personally was present and where Chas. T. Peterson took manual delivery of the certificates of stock, and became president of the Wells Construction Company with Newton H. Peer secretary in the place and stead of Lund.

On the 3rd of October, 1910, Wells Construction Company rendered a statement to Sandberg claiming a balance of over thirty-five thousand dollars then due.

On November 29, 1910, three days after the arrangements had been completed with the Vancouver Banks about the trusteeship through Kentucky Liquor Company, Sandberg renders statement to Wells Construction Company claiming some three thousand dollars due the community personalty. These transactions alone demonstrate community interest.

But on November 26, 1910, by agreement of Kentucky Liquor Company (Sandberg's business, and way of doing business) with Wells Construction Company, and Simon Mettler and George Vergowe individually, this Company of Sandberg's became **trustee** for Peter Sandberg and others, but

for Peter Sandberg specifically to indemnify and save him harmless from

(a) bond for and to Powell River Paper Company

(b) "claims and accounts."

Chas. T. Peterson, the attorney for Sandberg, swore on the stand, as a witness for his client Sandberg, that Elmer M. Hayden became successor trustee to Kentucky Liquor Company and the property described in the instrument of November 26, 1910, was foreclosed and sold in pursuance of its terms.

It is exceedingly important, if taken as true, that one of the banks absorbed all the proceeds, because thereby community liabilities were so much reduced, Sandberg relieved, and so much of the debt paid to and received by the bank then holding Sandberg's personal endorsement on the renewed note.

Between June 20, 1910, and November 26, 1910, Sandberg personally had made two or three trips to Vancouver, B. C., while Wells Construction Company was working on Powell River contract affecting the liabilities involved in the case at Bar.

Notably the visit of July, 1910, and of October 19, 1910, when guaranty agreements in writing providing for joint and several liability upon the part of Sandberg, Mettler, Vergowe and Wells were entered into with Molsons Bank touching financial operations of Wells Construction Company.

Moreover, the visit of Peter Sandberg to and with the Bank of Vancouver produced transactions intimately associated with that bank's participation in the trust agreement of November 26, 1910, under which Sandberg's company (Kentucky Liquor Company) was trustee.

It is the conceded fact as well as the sworn evidence that from and after marriage November 30, 1894, Peter Sandberg never owned, managed or held property separate and apart from the community.

Likewise Mathilda Sandberg had not then and has not other property than the community. The management and care of all of which by statutory law of the State and her expressed confidence and trust in her husband she left to him, and his and her attorneys, Bates, Peer and Peterson.

It is therefore indisputable that all acts and things done by these people were community acts and things, whether successful or not, and community transactions for which the community took its chance of liability.

Any liability, however, resulting could only be satisfied out of the community, and any indemnity given or benefit accruing could only be for that community.

When Sandberg originally signed the indemnity agreement, "plaintiff's exhibit 2," he and his wife both knew there was no other property existing than community property. When the agreement

was taken from Wells Construction Company to save harmless Sandberg from any liability, that liability so saved was community liability and hence intended community benefit.

When the trust agreement of November 26, 1910, was taken, the plain and evident and therein expressed purpose and intention was to protect the community through its agent, Sandberg.

It is the law and the fact, and Sandberg knew, that the community **personalty** was all under his care, control and management as the husband and therefore the rents, issues, incomes and revenue from the community **realty** were answerable to the created liability if it became necessary to enforce the plaintiff's exhibit 2; and in fact by unmistakable language, without any suggestion of excuse, Sandberg expressly stipulated and said in paragraph X of that exhibit that he and his then property (but he and his wife swear that then and now they had no other than community) was beneficially interested in the doings of Wells Construction Company and the issuance of the bond by the American Surety Company to Powell River Paper Company, Ltd., so that the contract might be obtained and the dam built out of which expected profit was to be derived.

The American Surety Company in good faith executed and performed its part, and has sustained and paid liability; although Sandberg was called on to defend, and did not; although Sandberg com-

munity was called on to pay and did not and yet has not.

Nevertheless the **only** property of either or all the defendants is confessedly community estate, both real and personal.

Material information was before the defendants and each of them through their attorneys.

Bates, Peer and Peterson were and are attorneys, in all the matters and during all the times mentioned in the scope of this case for the following named

- (1) Peter Sandberg
- (2) Mathilda Sandberg
- (3) Wells Construction Company and respectively president and secretary thereof on November 26, 1910
- (4) Receiver of Wells Construction Company
- (5) Bank of Vancouver in Mettler bankruptcy proceedings
- (6) Molsons Bank in Mettler bankruptcy proceedings
- (7) Kentucky Liquor Company

each and all of whom featured themselves in this case with participating interests in the community management of community property by the community agent, Peter Sandberg.

The benefit accruing to the community from Sandberg's acts was allowing Wells Construction Company to get the bond so that it might proceed with its contracts and repay to Sandberg and his

wife the moneys moving between Wells Construction Company and Sandberg and his wife for the construction of the building described in "defendant's Exhibit A."

Two things were evident at the time Sandberg entered into the indemnity agreement with the plaintiff: **First**, that getting the contract from Powell River Paper Company would enable Wells Construction Company to get money to pay Sandberg back for the money he had advanced on his building, or enable the Wells Construction Company to complete the contract with Sandberg as to that building, or, **second**, Sandberg, by reason of the instruments executed to him, would be enabled to recoup for the benefit of the community the advances that he claims he already made, and these transactions all grew out of one and the same subject matter, to-wit, the relations of Sandberg with the Wells Construction Company, through his attorneys, through himself and through the witnesses who testified for him.

The Supreme Court of Washington, says in the McGregor case (58 Wash. top of page 80):—"The community having received the benefit should now be estopped from denying its liability."

Moreover, the judgment rendered in British Columbia in behalf of Powell River Paper Company is conclusive upon Sandberg and wife; they were notified and had an opportunity to defend; they could have defended and they did not do so,

and they are under the law laid down by Judge Donworth when a Judge of this Court and afterward affirmed by the Circuit Court of Appeals for this Circuit, concluded in all respects by that judgment.

Robbins v. Chicago, 4 Wall 657, 18 L. Ed. 430;

Washington Gas Light Company v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712, at p. 719;

Compagnie v. Burley, 183 Fed. 168 near foot of page.

Note: (A decision by District Judge Donworth in this same Court.)

Affirmed by Circuit Court of Appeals, Ninth Circuit, 194 Fed. 335.

The evidence is uncontradicted and unexplained that Peter Sandberg upon his oath, February 20, 1911, in a cause in the Superior Court, as per the complaint offered and received in evidence, wherein Peter Sandberg was plaintiff and Simon Mettler and others defendants,—that he, Peter Sandberg, then stated and swore:—

“That on or about August, 1910, Wells Construction Company, Simon Mettler and his wife, George Vergowe and his wife and Joe Wells and his wife entered into an oral agreement with plaintiff wherein and whereby, in consideration of plaintiff’s endorsing certain

notes, bonds and guarantees hereinafter particularly referred to, to enable said Wells Construction Company, a corporation in which said persons were interested as stockholders, to get credit with which to raise money to carry on its said business of contracting and constructing buildings and improvements for which said Wells Construction Company then held contracts, it was agreed that they * * * would convey by deed real property in Pierce County * * * to fully secure and indemnify plaintiff on account of his endorsement to said notes, bonds, guarantees and other commercial paper to enable said Wells Construction Company to obtain credit and money to carry on said business.”

Therein also Peter Sandberg swore on his oath:—

“That Simon Mettler gave a list of all his property which he and his wife were to convey to Peter Sandberg pursuant to said agreement ‘or as much thereof as plaintiff may deem necessary to protect, secure and indemnify him against liability in endorsing the notice and papers and in signing the guarantees and bonds * * * to enable them to obtain credit and money to carry on said contracting business.’ ”

And further Peter Sandberg swore in said complaint:—

“That pursuant to said agreement so entered into plaintiff on or about the —— day of Aug-

ust, 1910, went to the City of Vancouver, in the Province of British Columbia, where said Wells Construction Company, a corporation, was operating, and at its request and in accordance with said agreement * * * and signed an indemnity bond to said American Surety Company in the sum of \$25,000.00 to enable said defendants and said Wells Construction Company to enter into a certain contract with one Powell River Paper Company, a corporation.”

And said Peter Sandberg in said complaint further swore:—

“That the liability of plaintiff on account of the bond * * * executed by him pursuant to said agreement * * * has not as yet and cannot for some time in the future be fully ascertained and fixed, but plaintiff alleges the fact to be the sum will probably exceed \$30,000.00 over and above the securities and indemnity already held by plaintiff.”

The Supreme Court of the United States in *Pope v. Allis*, 115 U. S. 363, at p. 372, 29 L. R. A. 393, at page 397, holds that a pleading in an action at law sworn to by the party is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated.

Citing *Elliott v. Hayden*, 104 Mass. 180 and other cases.

The Supreme Court of the United States adhered to this rule with reference to affidavits or depositions wherein in the case of *Chicago & Northwestern Railway Company v. Ohle*, 117 U. S. 123, at p. 129, the Supreme Court says, speaking through Mr. Chief Justice Waite:—

“We see no error of the admission of the affidavit in evidence. The affidavit having been filed in the cause by the company as a ground for obtaining an order of the court in its favor was competent evidence against it on the trial of another issue.”

Citing *Pope v. Allis*, 115 U. S. 363.

It is also the rule in the Federal Courts,

General Electric Co. v. Jonathan Clarke, 108 Fed. 170.

One of the later State cases states the rule as follows:—

“Any pleading or other paper filed by a party in a cause which states facts relevant to the issues in another cause in which the party filing said pleading or paper is also there a party, may be read as evidence in such cause then on trial against the party who made it as an admission in evidence of the facts stated.

Snyder v. Chicago Railway Co., 112 Mo. 527,
20 S. W. 885;

St. Paul Fire Marine Insurance Co. v. Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483;

Elliott v. Hayden, 104 Mass. 180.

In the case of Molsons Bank v. Peter Sandberg and wife in the Superior Court of the State of Washington for this County, Mathilda Sandberg stated in conjunction with her husband, her co-defendant, in that cause, that she knew that the Wells Construction Company was building a building, the amount of its contract price, the amount of payments thereon and how the work was progressing for the community estate composed of herself and her husband.

There can be no question that the work that Wells Construction Company was doing for the community was community work for the answer shows that the building was being erected upon what is described and pleaded as community property. As already shown the knowledge of the attorney is the knowledge of the client, notice to the attorney is notice to the client. Parties and their privies will not be permitted in a court of law to change their position to the injury and detriment of one who has acted on the faith thereof. The American Surety Company executed its bond and incurred liability thereon on the faith of the Sandberg community, and it is likewise unquestionable that the Sandberg community was upholding in all of the transactions Wells Construction Company

in the doing and carrying on of its business in order that the Sandberg community might be protected to the extent of its interest under its contract, "defendants' exhibit A," for the erection of the building and against any liability that might be incurred or come about through the endorsements and accommodations of Sandberg upon the other notes, claims and agreements which the agreement of November 26, 1910, positively states that he had assumed.

Hence it is that the community interest and no other interest than that of Peter Sandberg and his wife was or possibly could have been intended in the solemn stipulation that Peter Sandberg entered into as paragraph X of plaintiff's exhibit 2 on June 20, 1910, with American Surety Company, this plaintiff herein, and both of the defendants under the law are bound thereby.

It is quite immaterial to the case at bar what Sandberg's attorneys or himself were really doing or had theretofore done when on November 26, 1910, all of the stock of Wells Construction Company had actually come into their possession and control; and also quite immaterial what arrangements were made with the British banks; but it is enough to know and see from all of their acts and the documentary evidence in this case that all of the relations which all of them acted upon were regarded so far as joint and combined in interest that in every particular thing done from and inclusive of June, 1910, down to the failure of the

Wells Construction Company, Sandberg and those acting for him were taking every precaution to indemnify the community business managed by him and advised and directed by his attorneys, Messrs. Bates, Peer and Peterson, themselves officers of Wells Construction Company, in the interest of their community client.

It is a fundamental principle of law and an elementary rule of morals that innocent third persons without notice cannot without compensation be misled to their prejudice by the acts or omissions of any one. When Sandberg, therefore, who had no other than community interest to serve, acted in furtherance of his own supposed business interests and interlocked and combined his position as community manager with the Wells Construction Company affairs, he did so in carrying on community business. In fact, Judge Easterday in a recent case in the Superior Court of the State of Washington in Pierce County (Bankers Trust Company v. Peter Sandberg and wife, involving the business relations and operations of Sandberg with Lucas and Lucas Stronach Lumber Company) while commenting on similar dealings of Sandberg with others in that case, said:—

“The business relations and operations of Sandberg were so interdependent and so interlocked and so far in the possession and under the control of Sandberg that it cannot be said Sandberg was a mere accommodation maker of

these notes signed by him with them. In view of all the circumstances it appears to the court that Sandberg signed these notes in the furtherance of his own supposed business interest and that the liability thereon is that of the community.''

EIGHTEENTH TO TWENTY-FOURTH ASSIGNMENTS OF ERROR (RECORD PAGES 262 TO 266, BOTH INCLUSIVE) CONSIDERED TOGETHER.

These assignments relate to the exclusion and rejection by the Court of the evidence of R. H. Lund concerning whether or not Joe Wells had ever stated to him or whether he knew or whether from the accounts and books kept of the contract between Sandberg and Wells Construction Company he had ascertained what Peter Sandberg was owing the Wells Construction Company on and after June, 1910.

The Court even refused to allow the witness, Lund, to state as to what his knowledge was as to the amount of that particular indebtedness.

And it is assigned that the Court erred and abused its judicial discretion in respect of the whole course of the proceedings with respect to this witness, Lund.

It does not seem necessary to repeat all of the matters that took place which are covered so par-

ticularly in the assignments of error on pages 263 to 264 of the record. The Court will find, however, the whole of these proceedings set forth at pages 245 to 254, both inclusive.

The record of these proceedings with reference to the witness, R. H. Lund, are not long and the rulings of the Court were so prejudicial in respect of this witness's testimony to the plaintiff in error that the refusal of the Court to consider the same or allow him to testify or to consider the evidence in any way was necessarily an abuse of discretion, because such action is legally beyond reason.

Dyer v. National Steam Nav. Co., 118 U. S. 520;

Trustees v. Greenough, 105 U. S. 527.

That the Court committed a grave error is plainly observable from the Record, top of page 254, where he, as shown by the record, said with respect to this witness, Lund:—

“If he says that he did not say that I will have to disregard it.”

That the Court very unjustly treated this witness and the plaintiff in error appears quite clear from the statement and question in the middle of page 252 on cross-examination:—

“Q. You did not state in that connection up there, did you, that the stock was transferred to Peer & Peterson in trust for Mr. Sandberg?”

to which the witness answered “No, sir.”

Moreover, when this witness was asked what took place at the meeting of the stockholders during the latter part of October or early in November, 1910, in the Kentucky Building on Pacific Avenue, the witness answered, as shown on page 245 of the record, and specifically stated that the certificates of stock were at that time turned over to Mr. Sandberg, or rather to Mr. Peterson being there as attorney for Mr. Sandberg.

There was plain refusal by the Court to consider this evidence and to interpret it in accordance with the record; and this was prejudicial to the plaintiff in error because the Court should have found in accordance with the evidence but that it declined to do.

The assignments of error from Twenty-seventh to Thirty-eighth, inclusive, deal more or less with the matters already discussed.

But the Thirty-fifth assignment of error deals directly with the finding of fact XXV made by the Court against the evidence of R. H. Lund and based upon the ruling of the Court excluding the evidence of Lund.

The Court's finding XXV is upon pages 154 to 156 of the record and it will be observed that there is no reference whatever to the testimony of the witness, Lund, and that the finding is directly against the evidence.

Upon the whole case therefore as submitted by this record the plaintiff in error is surely entitled to a different judgment than was rendered by the Court below if the evidence offered is considered; and indeed the facts found by the Court when applied to the law require a judgment different than the Court reached in the case made.

Upon the defendants' own theory that the Wells Construction Company was solvent and able to pay all of its debts there was plainly no necessity for Sandberg to be taking indemnity from those who composed the Wells Construction Company upon account of any transactions he had with it. So it is perfectly plain, indeed conclusive, that what Sandberg was doing was for the benefit of protecting the community for which he was acting as the agent and in respect of which his wife was perfectly willing he should act, as the evidence nowhere discloses any objection; and of course neither of them can dispute what was done on the faith of what they promised to do as a community. The American Surety Company of New York did execute its bond, did sustain liability, and it gave its bond and incurred liability upon the faith of Peter Sandberg's contract, of which he had timely notice to defend in the Powel River suit served upon him "**at his residence**" and not at his place of business as the Court found apparently for the purpose, as

suggested by the defendant in error, of finding some excuse for the alleged want of the wife's knowledge.

Respectfully submitted,

WILLIAM C. BRISTOL,
Attorney for American Surety
Company of New York,
Plaintiff in Error.

Portland, Oregon,
May 2, 1917.

